IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1011

MARY KATHRYN BOYCE,
Petitioner,

v.

FILED
BOND ADJUSTMENT ASSOCIATES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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OPINION BELOW

The Circuit Court for Prince George's County by order and Opinion dated December 5, 1977, concluded that Bonded Adjustment Association, Inc. is engaged in a persistent course of conduct whereby it deals in lawsuits and peddles the services of its lawyers. Bonded employs attorneys to conduct legal proceedings for the profit of itself. *This conduct is the unauthorized practice of law and is void and champertous. No authority* has been cited to the Court which *defines unauthorized practice of law to be a tort.* Hence, *the Court concludes that defendant has not stated a cause of action which can entitle him to money damages. Bonded Adjustment Association, Inc. v. Boyce,* 106 WLR 253 (Appendix A). [Emphasis added]

By Order dated September 22, 1978, the Court of Appeals of Maryland denied the petition for a writ of certiorari, stating that there has been no showing that review by certiorari is desirable and in the public interest. (Appendix B).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257, as amended to July 29, 1970, Public Law 91-358, Title 1, Section 172(a), 84 Stat. 590. The ORDER of the Court of Appeals of Maryland was dated September 22, 1978:

"ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest."

QUESTION PRESENTED

Whether or not *one victimized by conduct* which results in the unauthorized practice of law *is entitled to damages* and whether or not *petitioner's counterclaim stated a cause of action against the respondent.*

STATUTES AND RULES INVOLVED

This is a case of first impression.

STATEMENT OF THE CASE

Bonded Adjustment Association, Inc. held an assignment from Keystone Woods Apartment, Inc., authorizing them to collect money owed to Keystone by Ralph E. Boyce. In

efforts at collection, Bonded, and on numerous occasions, contacted his mother, Mary Kathryn Boyce. The respondent made numerous calls to her home and to her place of employment, The American Security & Trust Co. in the District of Columbia.

By affidavit (Appendix C), Mary Kathryn Boyce stated she did not know how Bonded got her phone number at home or at work and she had told Bonded that she had never lived at her son's apartment, had never signed a contract, agreement, or lease to pay rent or other charges for the use of the apartment by her son. She told Bonded that her son was over 21, she could not and would not pay the bill. Bonded told her the bill was owed to Keystone Woods Apartment, Inc. and had to be paid. Shortly thereafter, she was personally sued and served by process by Bonded.

Petitioner obtained an attorney, filed an answer denying the debt and filed a counterclaim (Appendix D) alleging that Bonded, a collection agency, had engaged in malicious and intentional acts of conduct personally affecting her, stated that Bonded was engaged in the unauthorized practice of law toward her, asked the court to dismiss Bonded's suit against her, and made a demand for compensatory and punitive damages against Bonded, for its conduct towards her and its unauthorized practice of law. Petitioner paid for and elected a trial by jury on her counterclaim.

The case was set for jury trial on October 4, 1977, but on October 3, 1977 the case was taken under advisement and the trial date was held in abeyance. On December 6, 1977, an opinion and order was issued by the Circuit Court of Prince George's County: *Bonded Adjustment Associates, Inc. v. Boyce,* 106 WLR 253 (Appendix A), in which the

Circuit Court held that respondent was in the unauthorized practice of law, but dismissed petitioner's counterclaim, holding that her counterclaim did not state a cause of action which would entitle her to collect money damages.

REASONS WHY THE WRIT SHOULD BE GRANTED

A court has the inherent power to prohibit the unauthorized practice of law; it has the obligation to protect the individual, the public and the administration of justice by forbidding the unwarranted intrusion of those unskilled into the practice of law, and *those persons directly injured and victimized as the result of this unlawful conduct should have the right to seek redress for damages in the Court to which they have been involuntarily brought.* The Maryland Constitution, Declaration of Rights, Article 19, states in effect that for every injury sustained there ought to be a remedy. The Common Law of Torts states further that *for every legal wrong there is a legal remedy.* See 17 ALR 3(d) 1191. "Punitive Damages in Tort Cases in Maryland," by J. F. McCadden. Vol 6 Univ. of Baltimore Law Review p. 204 (1977). The theory has been discussed in Prosser, *Law of Torts*, p. 11, 2nd Ed:

> "It has been defended as a salutary method of discouraging evil motives, as a partial remedy for the defect in American civil procedure which denies compensation for actual expenses of litigation, such as counsel fees, and as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime, and which a private individual would otherwise find not worth the trouble and expense

> of a lawsuit. At any rate, it is an established part of our legal system, and there is no indication of any tendency to abandon it."

This philosophy was also expressed by Justice Berger in the case of *Brown v. Coates*, 253 F.2d 36, 102 U.S. App. D.C. 300, 305 (1958):

> ". . . *Punitive damages are particularly apt* in such circumstances because they both punish the wrongdoer, and offer the wronged *a greater incentive to bring derelicts to justice, a process which can subject the victim to considerable expense and trouble."* [Emphasis added]

Legislation has been enacted by Congress in the Federal regulation of debt collection agencies: the Consumer Credit Protection Act, 15 USC 1691, which states in Sec. 813:

> "(d) An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs."

The need for this legislation was detailed in the legislative history of the Consumer Credit Protection Act, PL 95-109, in Senate Report 95-382, pp. 1696, 1697, 1698:

> "The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem. . .
>
> "Debt collection by third parties is a substantial business which touches the lives of many Americans. There are more than 5,000 collection agencies across the country . . .

"While 37 states and the District of Columbia do have laws regulating debt collectors, only a small number are comprehensive statutes which provide a *civil* remedy. As an example of ineffective State laws, of the 16 states which regulate by debt collection boards, 12 require by law that a majority of the board be comprised of debt collectors. [Emphasis supplied]

"The Committee has found that collection abuse has grown from a State problem to a national problem. The use of WATS lines by debt collectors has led to a dramatic increase in interstate collections. State law enforcement officials have pointed to this development as a prime reason why federal legislation is necessary, because State officials are unable to act against unscrupulous debt collectors who harass consumers from another State.

". . . this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed."

Legislation has been enacted by the State of Maryland in the Maryland Consumer Debt Collection Act, Annotated Code of Maryland, Consumer Law Volume, Sec. 14-203 (1975 Replacement Volume):

"A collector who violates any provision of this subtitle is liable for any damages proximately caused by the violation, including damages for emotional distress or mental anguish suffered with or without accompanying physical injury."

However, the United States District Court in Maryland in interpreting the above Maryland statute, held that the words "proximately caused" meant actual damages only. *Cilento v. B.T. Credit Co., Inc.*, 424 F.Supp. 1 (D.Md. 1977). Notwithstanding this decision, the Federal Fair Debt Collections Act, Sec. 813 (15 U.S.C. 1692(k)) allows recovery of actual damages, punitive damages and attorneys' fees for similar violations.

Petitioner submits that the Federal Court has interpreted a Maryland statute contrary to the Federal statute and this decision is in irrevocable conflict with important questions of Federal and State law, as well as common law.

The Superior Court for the District of Columbia, after having found that a collection agency was engaged in the unauthorized practice of law, set the case down for further trial on the issue of punitive damages to be assessed against J.H. Marshall and Associates, Inc. for prosecuting this action and engaging in the unauthorized practice of law. *J. H. Marshall and Associates, Inc. v. Burleson*, 99 WLR 2177 (Appendix E).

The refusal to permit the petitioner the right to seek redress in her counterclaim for damages against the respondent was in violation of fundamental rights guaranteed to her by Article 19 of the Constitution of Maryland, and the Constitution of the United States, Amendment V of the Due Process Clause, Amendment XIV of the Due Process and Equal Treatment Clause, and Amendment VII of the Right of Trial by Jury. Further, petitioner was denied the limited remedial rights legislated to her by the Fair Debt Collection Practices Act, 15 USC 1692, and the Annotated Code of Maryland,

Commercial Law Volume, Sections 14-201, 2, and 3 (1975) Replacement Volume).[1]

CONCLUSION

Petitioner states that her counterclaim seeking compensatory and punitive damages against respondent does state a cause of action and she asks that her case be remanded for a trial.

Respectfully submitted,

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Of Counsel

[1] *Snyder v. Mass.*, 291 US 97 (1934), p. 105. The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental.

APPENDIX A

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

BONDED ADJUSTMENT ASSOCIATION, INC.
Assignee of Keystone Woods Apartments, a corporation

Plaintiff

vs. Law No. 66,541

RALPH E. BOYCE, a/k/a, ED BOYCE

Defendant

OPINION AND ORDER OF COURT

The issue before the Court is whether a collection agency is engaged in the unauthorized practice of law when it regularly takes assignments of accounts for collection, brings suit in its own name, employs an attorney and pursuant to agreement deducts a percentage of the money collected and returns the balance to the creditor. This question comes before the Court by way of a counterclaim filed by the defendant, debtor. Both parties have moved for summary judgment on the issue. The facts are not in dispute.

Bonded Adjustment Association, Inc. (hereinafter Bonded) is a District of Columbia Corporation licensed to do business in Maryland. As is their common practice, Bonded took an assignment of a money claim which Keystone Woods Apartments had against one of its tenants, Ralph E. Boyce. The written agreement provided as follows:

> For valuable consideration we hereby sell, assign and transfer unto Bonded Adjustment Association, Inc. certain claim of Keystone Woods Aparrtments, a Corporation, against Ralph E. and Mary Katherine Boyce amounting to $300.00 and we do hereby authorize Bonded Adjustment Association, Inc. to bring action or suit thereon in their own name and to do any and all things necessary to enforce collection of said claim.

No present consideration was exchanged. However, by separate agreement, it was understood between the parties that Bonded would retain 50% of the amount collected and would remit the balance to the creditor, Keystone Woods Apartments. After attempting without success to collect from the Boyces, Bonded filed suit, represented by its attorney. The defendants responded with a counterclaim alleging unauthorized practice of law. Bonded subsequently dismissed the defendant, Mary Katherine Boyce, and amended the addamnum from $300.00 to $100.00 against Ralph E. Boyce.

Summary judgment is proper in this case inasmuch as the facts are not in dispute. Maryland Rule 610.

Plaintiff contends that its activities are authorized by its charter, by the Maryland Rules of Procedure and by the laws of Maryland. Maryland Corporations cannot commit acts "inconsistent with law." Annotated Code of Maryland, Corporations and Associations Article, Section 2-103 (17). "A foreign corporation may not do any kind of intrastate, interstate, or foreign business in this State which the laws of this State prohibit a Maryland Corporation from doing." Annotated Code of Maryland, Corporations and Associations Article, Section 7-102. Hence, a corporate charter cannot confer legality upon an otherwise unlawful activity.

The plaintiff cites the Maryland Rules of Procedures, Rule 240, which permits assignees to bring actions in their own name. The fact that the Rule allows assignees to sue in their own name does not answer the question of whether plaintiff's course of conduct is the unauthorized practice of law. "To hold, however, that a plaintiff meets the test of the real party in interest statute is a far cry from holding that, in bringing such suit, he is not engaging in the unauthorized practice of law. . . ." *Bay County Bar Association v. Finance System, Inc.* (1956) 345 Mich. 434, 76 NW 2d 23, 25.

Chapter 319, Laws of 1977, effective in 1978, recently enacted by the Maryland Legislature, establishes a licensing board for collection agencies. Although the law doesn't address the activity of collection agencies receiving assignments of claims for no present consideration and suing on these claims and remitting part of the proceeds, plaintiff argues that if the legislature had intended to prohibit such activity it would have done so. Plaintiff also cites the Annotated Code of Maryland, Commercial Law Article, Section 15-501 which prohibits assignments of claims by citizens of Maryland against citizens of Maryland for collection in courts outside the State. Bonded argues that by negative inference, we can conclude that the legislature has authorized creditors to assign claims to agencies for collection in the courts of this State.

In a case decided in 1969, the Court of Appeals addressed itself to the issue of legislative power to regulate the practice of law. We quote at length:

> Under our constitutional system of separation of powers, the determination of what constitutes the practice of law and the regulation of the practice and of its practitioner is, and essentially and

appropriately should be a function of the judicial branch of the government. In many states it has been held that the legislative branch cannot constitutionally exercise that judicial function although it may make implementing regulations. In Maryland there has always been a comfortable accommodation in this area. See *52 Transactions of the Maryland State Bar Association* (1947), pp. 152-181, and *Bastian v. Watkins Clerk*, 230 Md. 325. The legislature has forbidden the practice of law by one not a lawyer (and specified some 'wherefores') in Section 1 of Article 10 and made it a misdemeanor for a layman to practice law in Section 32 of Article 10, but it consistently has recognized that the courts can and should decide in any instance presented to what does and what does not constitute the practice of law. *Public Service Commission of Maryland v. Hahn Transportation, Inc.*, et al., 253 Md. 571, 583.

THE NATURE OF THE ASSIGNMENT

In *State Ex Rel. State Bar v. Bonded Collections*, 36 Wis. 2d 643, 154 N.W. 2d 250, 27ALR 3d 1138, the Supreme Court of Wisconsin addressed the issue of unauthorized practice whereby a collection agency takes an assignment of an account for collection, furnishes an attorney, brings suit in its own name, retains a percentage if successful and remits the balance to the assignor. The Court analyzed the nature of the assignment and concluded that an assignment of this nature passes only a limited interest in the subject matter. The Court wrote:

> For procedural purposes an assignee of a claim for collection is, indeed, the real party in interest, but his interest is a limited one. The assignment confers upon him only a naked legal title, but the beneficial or equitable interest remains in the assignor. 6 CJS Assignments Section 94, page 1151. Thus, the beneficial owner of the chose in action is not the collection agency but the creditor. It is most inappropriate for the defendants to gain procedural standing to sue by complying with what is somewhat inappropriately in this context known as the real-party-in-interest statute and then assert that because the assignee is the real party in interest in the procedural sense it stands in all respects in the shoes of the creditor. This is not the fact. The true client, the party whose right of action is at stake in the lawsuit, remains the creditor.

After the assignment has been effected, the creditor, in this case Keystone Woods Apartments, is still the equitable or beneficial owner of the money claim reduced by the service charge of the assignee – collection agency, in this case Bonded Adjustment Associates, Inc. This situation presents two problems. The collection agency is interposed between the true client, the creditor, and the attorney, thus disrupting the attorney/client relationship. Secondly, the collection agency is engaged in the business of peddling the services of the attorney.

THE ATTORNEY/CLIENT RELATIONSHIP

Once the account has been assigned to Bonded, the original creditor has no control over whether suit may or may not be filed. When normal collection procedures are exhausted, Bonded consults their attorney who decides whet-

her to file suit. This practice clearly interferes with the attorney/client relationship, for as discussed above, the original creditor is the beneficial owner of the money claim and hence, the true client. The direction of litigation is a "prerogative reserved to the client alone." *State Ex. Rel. State Bar v. Bonded Collections*, supra. As explained by the Supreme Court of Utah:

> Thus while a layman may have an agent select an attorney for him and even deal with the attorney through the agent, the attorney must in fact represent the purported principal rather than the purported agent. The interjection of the collection agency between the client and the attorney so that the attorney would be answerable to the collection agency as principal would come within this objection. *Nelson v. Smith* (1944) Utah 382, 154 P. 2d. 634, 157, A.L.R. 512.

The New York court wrote this:

> The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the active litigant. *In The Matter of Co-Operative Law Co.*, (1910) 198 N.Y. 479, 92 N.E. 15 at page 16 of 92 N.E.

This Court concludes that where, as here, any person or corporation or business association of any type by a per-

sistent course of conduct interposes itself between attorney and client in such a manner so that the attorney owes a duty to the intermediary rather than the client, that this constitutes the unauthorized practice of law on the part of the intermediary. See *Code of Professional Responsibility*, Canon 3.

The highest courts of Virginia (*Richmond Assoc. of Credit Men v. Bar Assoc. of Richmond*, 167 Va. 327, 189 S.E. 153), Tennessee (State Ex *Rel. District Attorney v. Lytton*, 172 Tenn. 91, 110 S.W. 2d. 313), Massachusetts (*In Re Lyon*, 301 Mass. 30, 16 N.E. 2d. 74), Ohio (*In Re Incorporated Consultants*, 6 Ohio Misc. 143, 216 N.E. 2d, 912), Michigan (Bay *County Bar Assoc. v. Finance System, Inc.*, et al., 345 Mich. 434, 76 N.W. 2d 23), and the District of Columbia (*J.H. Marshall v. Burleson*, 313 A. 2d. 587) have used similar reasoning to invalidate the activities of collection agencies.

THE SALE OF LEGAL SERVICES

The Court finds that Bonded is in effect peddling the services of its lawyer by engaging in a persistent course of conduct by which it takes assignments, refers the cases to its lawyer, conducts the litigation at its own expense and retains a portion of the proceeds. This conduct is champertous. Champerty has been defined as a bargain between the champertor and the plaintiff or defendant in a suit whereby the champertor maintains suit at his own expense in exchange for a portion of the proceeds upon successful termination of the case. *Sapp v. Davids* 176 Ga. 265, 168 S.E. 62. This is precisely what Bonded has done in this case. In *Midland Credit Adjustment Co. v. Donnelly* 219 Ill. App. 271, it was held that a collection agency which took assignments of claims and referred them to an attorney

remitting part of the proceeds to the original creditor was engaging in an activity which was void as against public policy. The Court pointed out that the collection agency could lawfully solicit collections which the lawyer was prohibited from doing by legal ethics and the lawyer could bring legal proceedings which the collection agency was prohibited from doing by law. Together these activities were void as against public policy. Apparently, the Court viewed the combination as a subterfuge to get around the prohibited conduct of each. In Missouri, the Appeals Court viewed similar conduct as "champertous, unlawful and void." *Curry v. Dahlberg*, 341 Mo. 897, 110 S.W. 2d. 742, Motion for Rehearing overruled 341, Mo. 910, 12 S.W. 2d. 345.

This Court concludes that Bonded is engaged in a persistent course of conduct whereby it deals in lawsuits and peddles the services of its lawyers. Bonded employs attorneys to conduct legal proceedings for others for the profit of itself. This conduct is the unauthorized pracice of law and is void and champertous.

Even in the absence of statute, Courts have the power to enjoin from conducting such activity any person who is engaged in the unauthorized practice of law. *J.H. Marshall & Associates, Inc. v. Burleson*, 33 A. 2d. 587; *State v. Bonded Collections, Inc.* 36 Wis. 2d. 643, 154 N.W. 2d 250; *In Re Incorporated Consultants*, 6 Ohio Misc. 143, 216 N.E. 2d. 912; *Nelson v. Smith*, 107 Utah 382, 154, P. 2d. 634; *American Auto. Assn v. Merrick*, 73 App. D.C. 151, 117 F. 2d 23; *DePew v. Wichita Ass'n of Credit Men*, 142 Kan. 403, 49 P. 2d. 1041, cert. denied 297 U.S. 710, 56 S.Ct. 574, 80 L. Ed. 997. Moreover, the unauthorized practice of law constitutes contempt of court. *J.H. Marshall & Associates, Inc. v. Burleson*, 33 A. 2d. 587; *Bump v. District Court of Polk County*, 232 Iowa 623, 5 N.W. 2d. 914.

This Court finds that the question of unauthorized practice of law was properly brought before the court by way of counterclaim. A counterclaim can "embrace every species of legal demand." *Edmonds v. Lupton*, 253 Md. 93. Canon 3 of the Code of Professional Responsibility requires all members of the bar to "assist in the unauthorized practice of law." It is proper therefore for the defendant's attorney to bring plaintiff's conduct to the attention of the Court. The District of Columbia Court of Appeals in *J.H. Marshall Associates, Inc. v. Burleson*, 313 A. 2d 587, quoting the Supreme Court of Kansas, wrote:

> The form in which the matter is called to the court's attention is not so important. Since the Court has jurisdiction of the subject-matter, any recognized procedure by which a change or complaint is entertained, and the one charged is given proper notice, and in which there is a full hearing fairly conducted, would appear to be sufficient. *State ex rel. Boynton v. Perkins*, 138 Kan. 899, 28 P. 2d. 765, 769.

Hence, we conclude that the issue of unauthorized practice of law is properly before the Court.

This Court in no way condemns all the activities of collection agencies as the unauthorized practice of law. This Court recognizes that collection agencies provide many services which are both lawful and commercially expedient. We hold only the Bonded Adjustment Association, Inc. is engaged in the unauthorized practice of law when, as here,

it takes assignments of claims for no present consideration, refers these claims to its attorney and pursuant to agreement retains a percentage of the fee collected and remits the balance to the assignor.

Defendant, Ralph E. Boyce, has asked for money damages in addition to injunctive relief. No authority has been cited to the Court which defines unauthorized practice of law to be a tort. Hence, the Court concludes that defendant has not stated a cause of action which can entitle him to money damages.

Accordingly, it is this 5th day of December, 1977, in the Circuit Court for Prince George's County, Maryland,

ORDERED, that defendant's Motion for Summary Judgment insofar as it seeks a permanent injunction is hereby granted and Bonded Adjustment Association, Inc. is hereby enjoined and restrained from the course of conduct whereby it takes assignments of money claims for no present consideration, refers the claims to its attorney and retains a contingency fee based on the amount collected, and it is further

ORDERED, that plaintiff's Motion for Summary Judgment be and the same hereby is denied inasmuch as it has been determined that plaintiff is not properly before this Court. However, the denial of this Motion is without prejudice to the rights of Keystone Woods Apartments, A Corporation, the beneficial plaintiff, and it is further

ORDERED, that defendant's Motion for Summary Judgment insofar as it seeks a money judgment and punitive damages is hereby denied.

Judge

Copies to:

Gary V. Ward, Esquire
5305 Kenilworth Avenue
Riverdale, Maryland 20840

William A. Burleson, Esquire
Mark Lee Phillips, Esquire
4809 Flanders Avenue
Kensington, Maryland 20795

APPENDIX B

RALPH E. BOYCE et al.

v.

BONDED ADJUSTMENT ASSOCIATION, INC.

In the
Court of Appeals
of Maryland

Petition Docket No. 255
September Term, 1978
(No. 1376, September Term
1977 Court of Special Appeals

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/Robert C. Murphy
Chief Judge

Date: September 22, 1978

APPENDIX C

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

BONDED ADJUSTMENT AS-	)	
SOCIATION, INC.	)	
Assignee of Keystone Woods	)	
Apartments, a corporation	)	
Plaintiff	)	
vs.	)	LAW NO. 66,541
	)	
RALPH E. BOYCE, a/k/a,	)	
ED BOYCE	)	
and	)	
MARY KATHRYN BOYCE	)	
Defendants	)	

AFFIDAVIT OF MARY KATHRYN BOYCE

Comes now Mary Kathryn Boyce, being first duly sworn on oath, depose and says:

My name is Mary Kathryn Boyce and I work for the American Security and Trust Bank in Washington, D.C. I have been named as a defendant in a small claims action filed against me and my son by Bonded Adjustment Association Inc., assignee of Keystone Woods Apartments, a corporation.

I have never lived at apartment no. 103, 6563 Hil-Mar Drive, Forestville, Maryland and I have never signed any contract, agreement, or lease to pay rent or charges for the use of this apartment by my son.

I was contacted numerous times in 1976 by employees of Bonded Adjustment Association Inc., and was told that a bill owed to Keystone Woods Apartments by my son and his wife had to be paid. I told these people that my son was over 21, I did not live with him, and that I could not and would not pay this bill.

I do not know how Bonded Adjustment Association got my phone number at my home or at my work.

/s/ Mary Kathryn Boyce
Mary Kathryn Boyce

Subscribed to and Sworn to before me Catherine C. Upshur, a Notary Public in the District of Columbia, September 30, 1977.

/s/ Catherine C. Upshur
Catherine C. Upshur
NOTARY PUBLIC

My commission Expires November 30, 1979

APPENDIX D

IN THE DISTRICT COURT FOR PRINCE GEORGE'S COUNTY
14757 Main Street, Upper Marlboro, Maryland 20870

BONDED ADJUSTMENT ASSOC., INC., Assignee of Keystone Woods Apartments
A Corporation

Plaintiff

TRIAL DATE: February 2, 1977

vs.

RALPH E. BOYCE

CASE NO. CV 5-16013-76

and

MARY KATHRYN BOYCE

Defendant

ANSWER

Come now the Defendants, RALPH E. BOYCE and MARY KATHRYN BOYCE, by their attorney, MARK LEE PHILLIPS, and as an Answer to the Plaintiff's Statement of Claim state:

(1) That the Defendants never were indebted as alleged;

(2) That the Defendants never promised as alleged.

COUNTERCLAIM

(1) The Plaintiff, BONDED ADJUSTMENT ASSOC., INC., is a collection agency and is not licensed to practice law.

(2) That, on information and belief, the Plaintiff has commenced this action on the basis of a colorable assignment, the only purpose of which is to permit the Plaintiff to attempt to engage in the unauthorized practice of law.

(3) That, on information and belief, the Plaintiff as a matter of widespread practice intentionally is engaged in the unauthorized practice of law.

(4) That, as a result of the present action against the Defendants, the Plaintiff is intentionally and maliciously engaging in the unauthorized practice of law in this case against these Defendants.

(5) As a result of the malicious and intentional conduct of the Plaintiff by which stands in contempt of this Court, the Defendants have suffered actual damages in defense of this action and emotional distress to the extent of Fifty Thousand ($50,000.00), and the Defendants further request punitive damages in the sum of Two Hundred Thousand ($200,000.00) Dollars.

WHEREFORE, the Defendants demand judgment dismissing the claim of the Plaintiff against them; the Defendants further demand a judgment of Two Hundred Fifty Thousand ($250,000.00) Dollars against the Plaintiff on

their counterclaim, and the Defendants further request that a permanent injunction issue against the Plaintiff, restraining said Plaintiff from engaging in the unauthorized practice of law in Maryland.

/s/Mark Lee Phillips
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WILLIAM A. BURLESON
Co-counsel for Defendants
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ELECTION OF JURY TRIAL

The Defendants, RALPH E. BOYCE and MARY KATHRYN BOYCE, elect a trial by jury on all issues.

/s/Mark Lee Phillips
MARK LEE PHILLIPS
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of January, 1977, a copy of the foregoing Answer and Counterclaim was mailed, first-class postage prepaid to Gary V. Ward, Esquire, Attorney for Plaintiff, 5305 Kenilworth Ave., Riverdale, Maryland.

/s/Mark Lee Phillips
MARK LEE PHILLIPS
Attorney for Defendants

APPENDIX E

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Small Claims and Concillation Branch

J. H. MARSHALL & ASSOC., INC.

v. Civil Action No. SC 6444-71

WILLIAM A. BURLESON

OPINION AND ORDER

This action came before the Court sitting in Civil Assignment[1] on both the motion of plaintiff J. H. Marshall and Associates, Inc. (hereinafter referred to as "J.H. Marshall") to dismiss the counterclaim and the motion of defendant William Burleson to compel discovery and for summary judgment in the form of a permanent injunction to restrain J.H. Marshall from engaging in the unlawful practice of law. On September 10, 1971, this Court heard preliminary arguments and then set the case down for further oral argument on September 23, 1971.

As framed by the parties during that hearing, this case raises the following issue: When a collection agency solicits debts for collection and retains counsel in order to prosecute and collects debts assigned to it, is it engaged in the unauthorized practice of law, particularly where the original creditors are paid no consideration[2] for the assignment[3] but merely receive an agreed portion of the proceeds of the litigation? The issue in this case is a matter of first impression in this jurisdiction and of great importance both to the bar and the business community.

[1] This lawsuit was filed in Small Claims Branch but came before the Court sitting in Civil Calendar Control for oral argument on contested motions.

Upon consideration of all the facts in this case, the Court finds that the failure of J.H. Marshall to purchase such assigned accounts for valid, legally enforceable, and adequate consideration constitutes the unauthorized practice of law. For further reasons set forth below, the Court denies J.H. Marshall's motion to dismiss the counterclaim and grants partial summary judgment in the form of a permanent injunction restraining J.H. Marshall from engaging in the unauthorized practice of law, as described in this opinion. Further trial in this case will still be necessary in order to determine whether punitive damages should be assessed against J.H. Marshall.

[2] It is a matter of basic contract law, as relates to assignments, that "As between the assignee and the assignor . . . a valuable consideration is essential to support an assignment . . . [and] an assignment is unenforceable where there is total failure of consideration given therefore . . . ." 6 C.J.S. Assignments §69, at 1120-1121 (footnotes omitted). See also *Scott v. First National Bank of Baltimore*, 224 Md. 462, 168 A.2d 349, 352 (1961).

[3] Plaintiff refers to such debts as "assignments". However, by definition, a valid and legally enforceable assignment requires consideration. See p. 5. *infra.* Since plaintiff receives no consideration for the debts assigned to it (see Statement of Facts #3), there is no valid assignment of these debts to plaintiff. Such lack or inadequacy of consideration has been recognized as a "badge of fraud" in the District of Columbia. *Leonardo v. Leonardo*, 102 U.S.App. D.C. 119, 123 (1958). Hereinafter, these purported assignments will be referred to as "agreements".

I

The operation of the J.H. Marshall debt collection business, as admitted and stipulated by the parties, is stated as follows:

(1) Plaintiff, J.H. Marshall and Associates, Inc., is a District of Columbia corporation with the stated purpose of conducting business as an agent for the collection, adjustment, compromise and settlement of debts of all kinds, *purchasing* accounts receivable, debts and claims of all kinds, and possessing all powers necessary to conduct this business (emphasis added);

(2) J.H. Marshall publicly solicits accounts for collection and advertises "No charge unless we collect";

(3) J.H. Marshall conducts its business of collection by taking purported assignments in its own name without receiving any monetary consideration therefore, and for the sole purpose of effecting their collection;

(4) J.H. Marshall prepares statements of claims which it files in the Civil Division of Superior Court or in the Small Claims Branch (if the amount claimed is less than $750), and then makes payment of Court costs, and finally notifies its retained attorneys so that they can appear on the designated return date;

(5) J.H. Marshall remits to the original creditor two-thirds of the amount collected by the litigation and retains one-third of that amount as its service charge, out of which J.H. Marshall pays its retained attorney;

(6) These facts represent the general business practices of J.H. Marshall.

In addition to these undisputed facts, the Court takes judicial notice of the following statistics:[4]

During calendar year 1970, J.H. Marshall filed 986 cases in the Small Claims Branch of the then General Sessions Court and 794 cases in the Civil Branch, for a total of 1780 cases.

The total caseload of the Civil Division in 1970 was 38,531 cases, thus the J.H. Marshall cases represented 4.6 percent of that Division's total caseload.

In 1971, up to September 1st, J.H. Marshall had filed 843 cases in Small Claims Branch and 176 in the Civil Branch, for a total of 1019 cases.

The total caseload in the Civil Division for this year, up to September 1st, has been 27,124 cases, thus J.H. Marshall's cases represent 3.8 percent of that total.

II

Although this case is a matter of first impression in the District of Columbia, the basic problem of collection agencies engaging in the unauthorized practice of law is not novel. Based on facts similar to those in this case, courts in other jurisdictions have found that collection agencies were involved in the unauthorized practice of law.

In most states, collection agencies are either licensed or bonded, e.g. Massachusetts (Mass. Ann. Laws ch. 93, §24 (1967)) and Washington (R.C.W.A. ch. 19, §16.010 (1950)). However, the District of Columbia merely issues a corporate charter to collection agencies and by statute grants them power

[4] Obtained by telephone conversations with the Clerk of the Civil Division and the Chief Deputy Clerk of the Small Claims Branch.

to sue and be sued and to *purchase*, take, or otherwise acquire interests in real and personal property. See D.C. Code 29-904 (1967) (emphasis added). Nevertheless, this requirement that such account be "purchased", i.e. that valid, legal consideration be given, is apparently not complied with by J.H. Marshall.

This failure to give valid consideration or otherwise purchase the debts received under its agreements with creditors is one of the key elements upon which the Court bases its finding that J.H. Marshall is engaged in the unauthorized practice of law. By definition, an assignment is a contract and "is subject to the same requisites as to validity as other contracts, such as proper parties, mutual assent, *consideration*, and legal subject matter." *Black's Law Dictionary*, p. 154, citing *Hutsell v. Citizens National Bank*, 166 Tenn. 598, 64 S.W.2d 188 (1933 emphasis supplied).

It has been admitted by the parties that J.H. Marshall does not receive any consideration for its agreements to collect accounts (see Statement of Facts #3). As a result, J.H. Marshall never becomes a true assignee or real party in interest in the cases which it litigates. Therefore it has no standing to sue on those claims. It has also been admitted by the parties that in cases litigated by J.H. Marshall, the actual transfer of the claims may occur after J.H. Marshall has already begun collection efforts.[5] This time lag arises out of the informal arrangement between J.H. Marshall and its creditor/clients. The formal document purported to be an "Assignment" is merely a clerical proce-

[5] In the present case, counsel admitted at oral argument that the original dunning letter to Burleson was dated March 29, 1971. Yet the actual transfer of the claim from Leon Office Machines to J.H. Marshall did not occur until April 7, 1971.

dure that may or may not occur before J.H. Marshall begins collection efforts. These facts further demonstrate that the agreements used by J.H. Marshall do not satisfy the requisites for legally enforceable assignments.

Facts #4 and #5 demonstrate another aspect of the unauthorized practice of law engaged in by J.H. Marshall. J H. Marshall prepares the preliminary legal documents to initiate the lawsuits to collect the accounts and it pays the initial Court costs. Only then does it notify its retained counsel so that they can proceed with the additional legal work and court appearances. Furthermore, J.H. Marshall makes a profit from this legal work, by retaining a one-third contingency fee from the accounts collected by such litigation. Under this arrangement J.H. Marshall stands as an intermediary between the original creditor and the attorneys who are litigating his claim. Any lawyer-client relationship between the creditor and those attorneys is destroyed, and J.H. Marshall makes a profit on the legal work performed by its retained attorneys.

By soliciting accounts for collection (see Fact #2), J.H. Marshall is actually peddling the services of its retained attorneys. This fact further indicates that J.H. Marshall is involved in the unauthorized practice of the law. As a lay entity which shares in the legal fees paid to licensed attorneys, J.H. Marshall is interfering with the independent professional judgment that those attorneys should be exercising on behalf of the original creditor (Canon #5 of the ABA Code of Professional Responsibility). Those retained attorneys themselves risk unethical conduct by assisting J.H. Marshall in the unauthorized practice of law (Canon #3).[6]

[6] The Court does not wish to cast any adverse reflections upon counsel for J.H. Marshall, since the practices here are long-standing and have been accepted by the courts for many years. Nevertheless, this long history of acceptance cannot, of itself, obviate the unlawful nature of J.H. Marshall's activities.

III

The Court's conclusion in this case is consistent with the decisions of courts in numerous other jurisdictions. In *Nelson v. Smith*, 107 Utah 382, 154 P.2d 634 (1944), one of the critical facts that supported a finding of unauthorized practice was the collection agency's solicitation for claims to be collected. It then litigated those claims in its own name and was compensated by retaining a percentage of the amount collected. That compensation was "assumed to be in part allowed to pay for the legal services rendered" (154 P.2d at 639), and the Utah Supreme Court refused to be deceived by this subterfuge for a lay entity engaging in the practice of law. That Court also noted that a collection agency still is engaged in the unauthorized practice of law when it retains attorneys to appear in court, in cases where the litigation is being conducted for a collection agency's profit, since the agency is, in effect, peddling the services of its retained counsel. *Ibid.* at 640, citing *In re G.H. Otterness*, 181 Minn. 254, 232 N.W. 318 (1930). See also *In re Lyon et al.*, 301 Mass. 30, 16 N.E.2d 74, 77 (1938).

In a Tennessee case, the court held that a contingency fee arrangement, similar to that used by J.H. Marshall, did not constitute a valid assignment. *State v. James Sanford Agency*, 167 Tenn. 339, 69 S.W.2d 895 (1939). The court found that the original creditor was still the real party in interest in the suit and that the collection agency was interfering with the attorney-client relationship between that creditor and the attorney who was acting exclusively for the agency.

Where an assignment requires a lay person to hire an attorney to prosecute the collection of a debt owed to the assignor, there is actually a contract to furnish legal

services. That contract itself thus involves the assignee in the unauthorized practice of law. On this basis, the Court believes that *Cohn v. Thompson*, 16 P.2d 364 (1932), cited in J. H. Marshall's brief in opposition, can be distinguished from the present case. In the *Cohn* case, the court noted that the plaintiff had not agreed to furnish legal advice or counsel nor to prepare legal documents, nor did it regularly employ an attorney to perform such services for its assignor. *Ibid.* at 366.

Particularly in light of the time-lag between the dunning letters sent out by J. H. Marshall and the purported "assignment" of accounts by creditors, the Court agrees also with the Illinois Supreme Court that such assignments are a sham and subterfuge in order to allow the collection agency to sue in its own name without being authorized to practice law. See *People v. Securities Discount Corporation*, 361 Ill. 551, 198 N.E. 681 (1935).

Furthermore, the advertisements by J. H. Marshall may be viewed as champerty.[7] In *Gill et al. v. Richmond Co-op. Ass'n., Inc.*, 309 Mass. 73, 34 N.E.2d 509 (1941), the Supreme Judicial Court of Massachusetts indicated that where a party furnishes no consideration for an assignment and undertakes to prosecute claims at its own expense, with their only compensation a share of the pro - ceeds, such arrangements are "champertous" whether or not the party is a licensed attorney. 34 N.E.2d at 512. Such a contingency arrangement is used on a regular basis

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[7] "Champterty" is defined in *Black's Law Dictionary* (at 292) as "a bargain to divide the proceeds of litigation between the owner of the liquidated claim and a party supporting or enforcing the litigation," citing *Draper v. Zebec*, 219 Ind. 362, 37 N.E.2d 952, 956 (1941). See also *Johnson v. Van Wyck*, 4 App.D.C. 294, 311 (1894).

by J. H. Marshall and the element of champerty is further demonstrated by the Yellow Pages advertisement: "No Charge Unless We Collect." See Statement of Facts #2.

Although an assignee may technically be viewed as a real party in interest once an assignment from a creditor has been finalized, the Michigan Supreme Court has held that an assignee is still engaged in the unauthorized practice of law where it takes such assignments on a regular basis. In *Bay County Bar Ass'n. v. Finance System, Inc. et al.*, 345 Mich. 434, 76 N.W.2d 23 (1956), the court ruled as follows:

> ". . .we cannot escape the conclusion that engaging in the business of representing the interests of assignors and controlling the proceedings to be taken in suits on assigned claims in which assignors retain an interest, as done by defendants, is engaging in the practice of law . . . . When this is done by one not licensed as an attorney it constitutes the unauthorized practice of law whether done by him in person or through his agent, regardless of whether the latter be a layman or licensed attorney." 76 N.W.2d at 29 (citations omitted).

Like the Michigan court, the Court in this case believes that the contingency fee arrangement, combined with the lack of any consideration for the agreements which J. H. Marshall undertakes on a regular basis, demonstrate that the original creditors have retained an interest in the claim being litigated. Since J. H. Marshall controls the proceedings and has retained a law firm which acts as its agent, its actions constitute the unauthorized practice of law.

IV

The most recent case involving this issue is *State of Wisconsin, ex rel. State Bar of Wisconsin v. Bonded Collection Inc. et al.*, 36 Wisc.2d 643, 154 N.W.2d 250 (1967). Defendants have supplied the Court with the original decision and order of the Eau Claire County Circuit Court, dated February 2, 1967, and with the subsequent findings of fact and conclusions of law by that same court which were issued after the Wisconsin Supreme Court remanded the case to it for further proceedings.

The facts in that case appear to be on all fours with the case presently before the Court. The collection agency there had been soliciting accounts and claims from the public. It was engaged in collecting those accounts and furnishing legal services which included the preparation of legal documents, prosecution of the case, and appearance in the court by retained legal counsel. Like J. H. Marshall, it retained a certain percentage of the amount recovered in the litigation as compensation for its efforts.

Both the Eau Claire County Court and the Wisconsin Supreme Court found that there was no initial consideration paid for the purported assignment of accounts and that the attorneys' true clients were still the original creditor. 154 N.W.2d at 255.

Furthermore, the Wisconsin Supreme Court concluded that it was "sheer hyprocrisy" to treat the fixed percentage retained by the agency as actually representing the value of its share in the assigned claim. *Ibid.* at 256. Since the agency then paid its retained attorney out of that percentage, the Court concluded that the collection agency was engaged in the unauthorized practice of law and was selling

the services of its lawyer. *Ibid.* The attorney-client relationship between that lawyer and the original creditors was non-existent. By going into court and representing itself as the client, the collection agency was perpetrating a fraud on the court. *Ibid.*

At oral argument, counsel for J.H. Marshall urged the Court to distinguish the *Bonded Collection* case because the collection agency there was in the habit of advising the original creditors if non-litigative attempts at collection had failed and the accounts could only be collected by starting a lawsuit. There is nothing in the record of the present case which indicates that J.H. Marshall performs such an advisory function. However, that distinction does not obviate the fact that J.H. Marshall acts in other ways as an intermediary between the original creditors and the attorneys who litigate their claims. By so interfering with this attorney-client relationship and by receiving compensation for those collection efforts, J.H. Marshall is still engaged in the unauthorized practice of law as established by the cases discussed above. Furthermore, since J.H. Marshall never obtains a proper assignment nor pays any consideration, the original creditor remains the real party in interest and J.H. Marshall has no standing to litigate those claims.

Nor is it necessary to distinguish the *Bonded Collection* case because the Wisconsin Bar Association was the plaintiff there. All members of the bar have a responsibility under Canon 3 to bring to the court's attention, and to assist in preventing, the unauthorized practice of law. Defendant here, by virtue of its countercalim, is fulfilling its responsibility by calling this serious situation to the Court's attention.

V

Although there are no District of Columbia cases specifically on point relating to the issue in this case, the parties here have presented several District of Columbia cases as controlling on the issues of real party in interest and collection of assigned debts by litigation. In *Heiskell v. Mozie*, 65 U.S.App.D.C. 255 (1936), the United States Court of Appeals for the District of Columbia said that it would "Look through the shadow to the substance" (65 U.S.App.D.C. at 257) to determine whether the party conducting the litigation was actually the real part in interest on an assigned debt. In that case, the purported assignee of a claim for back rent was held to have "no legal title to the property, nor any present equitable interest." *Ibid.* The claimant there had been assigned the claim for the sole purpose of conducting litigation. The Court recognized that he was neither an attorney nor the real party in interest. Therefore the court held that the claimant had no standing to prsosecute the action. Furthermore, it noted that the same rule would apply to corporations. *Ibid.*

Secondly, the parties have called to the Court's attention the case of *Compton v. Atwell*, 86 A.2d 623 (D.C.App. 1952), aff'd. 93 U.S.App.D.C. 99 (1953). The facts in that case can be distinguished from the present lawsuit since the assignment there was specifically for the purpose of consolidating multiple debts and saving court costs. 86 A.2d at 624. Furthermore, those assignments represented only an isolated incident and were not part of an established, profitable business of account collection and litigation such as J.H. Marshall has been conducting.

Concededly, in *Compton*, the court would not have prevented Atwell from suing in his own name even if he had been a mere assignee for collection; but the U.S. Court of

Appeals for the District of Columbia has recognized that where a corporation has a business practice of "collecting claims owned by others, determining whether or when to sue, selecting and obtaining the attorney, and handling the suit in accordance with its own discretion," such a corporation is engaged in the unauthorized practice of law. *Merrick v. American Security and Trust Co.*, 71 U.S.App.D.C. 72, 76 (1939), citing numerous cases from other jurisdictions, at footnote 11.

In addition, the same court has recognized that where a creditor attempts peaceful collection of a liquidated claim through an agent or agrees to arbitration of his claim through an agent, there is no problem of unauthorized practice. But when a collection agency gives legal advice to the creditor, perhaps threatens legal proceedings, gives no valid consideration for the assigned claim, and employs attorneys to prosecute the claim in court, it risks engaging in such unauthorized practice of law. See *American Automobile Ass'n. v. Merrick*, 73 U.S.App.D.C. 151, 153 (1940).

Finally, and in passing, the Court notes that last year, J.H. Marshall was held to be engaged in unauthorized practice as a real estate broker since it had no broker's license but was operating on a collection fee basis and was attempting to collect unpaid rent. *Harrison v. J.H. Marshall, Inc.*, 271 A.2d 404 (1970).

VI

In conclusion, the Court recognizes that this represents a matter of great importance to the bar and the business community. Particularly, the small enterprises which rely extensively on collection agencies like J.H. Marshall will be hard-pressed to retain counsel to litigate all of their claims. However, the Court believes that these businessmen and the community as a whole will be better served if the unauthorized practice of law, like that of J.H. Marshall, is eliminated. By requiring adequate consideration[8] for assigned claims or in the alternative, litigation by creditors who are represented by their own counsel, the Court will preserve the integrity and efficiency of the attorney-client relationship and the adversary system as a whole

The Court, for its findings of fact, adopts the facts as admitted by the parties and as stated above (*supra*, pp. 2-3). As conclusions of law, the Court finds that defendant is entitled to partial summary judgment and a permanent injunction against J.H. Marshall to prevent it from engaging in the unauthorized practice of law, as evidenced by the following activities: (1) soliciting accounts for collection; (2) agreeing to collect accounts, by litigation if necessary, without paying any valid consideration; (3) retaining a contingency fee based on a fixed fraction of the amount collected; and (4) retaining counsel to litigate these claims. J.H. Marshall is hereby enjoined from such unlawful activities and is further enjoined from such unlawful activities and is further enjoined from filing any future cases in any division or branch of this Court unless it has first obtained valid, adequate, and legally enforceable consideration for such assigned claims. This order applies to all cases filed by J.H. Marshall, now pending in any branch or division of this Court, that were filed in violation of this order.

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[8] The precise amount which would constitute adequate consideration cannot be established as a hard-and-fast rule. It should be noted, however, that in other cases, "assignments of rights worth seven hundred dollars for five dollars, or of rights worth three hundred dollars for four hundred and thirty-five dollars have been held to be shockingly unconscionable . . . ." 6 C.J.S. Assignments §70, at 1123 (footnotes omitted).

In addition to granting this equitable relief, the Court grants judgment for defendant William A. Burleson and dismisses this claim of J.H. Marshall against him. Accordingly, J.H. Marshall's motion to dismiss the counterclaim is denied. However, this case must still be set down for further trial on the issue of punitive damages to be assessed against J.H. Marshall for prosecuting this action and engaging in the unauthorized practice of law. The Court grants this partial summary judgment on the basis of its inherent equitable power pursuant to D.C. Code §11-921. See *Sheherazade, Inc. v. Mardikian*, 143 A.2d 512 (D.C.App. 1958), and *Brown v. Greenwich Lounge, Inc.*, 225 A.2d 656 (D.C.App. 1967).

Finally, the Court commends counsel for both sides for their excellent briefs and oral arguments in this case.

SO ORDERED.

Tim Murphy, Judge

November 4, 1971